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APPLICATION OF

**LOUDOUN COUNTY POWER
COMPANY, LLC**

CASE NO. PUE010171

**For a certificate of public convenience
and necessity for electric generation
facilities in Loudoun County, Virginia**

HEARING EXAMINER'S RULING

August 15, 2001

The Commission issued its Order for Notice and Hearing on May 25, 2001, in which, among other things, the Commission stated it would consider whether a waiver, pursuant to § 56-234.3 of the Code of Virginia, should be granted to Loudoun Power Company, LLC ("Loudoun Power") to commence, at its own financial risk, initial site work and permitting at the proposed generation facilities. Any waiver granted would be interim pending entry of a final order in which the Commission determines whether the facilities should be authorized and exempted from the requirements of Chapter 10 (§ 56-232 *et seq.*) of Title 56 of the Code of Virginia. The grant of an interim waiver is not determinative of whether the Commission will or will not authorize the proposed facilities. The Commission's order permitted interested parties and the Commission's Division of Energy Regulation (the "Staff") to file comments to Loudoun Power's request for a waiver. Loudoun Power was further permitted an opportunity to file a response to any comments that were filed with the Commission.

On June 29, 2001, the Staff filed its comments in which it did not oppose the grant of the interim waiver until the Commission takes final action on Loudoun Power's Application. However, the Staff qualified its position. Based upon its review of the Application, the Staff found that Loudoun Power would sell power generated at its proposed facilities solely in the wholesale market and would be subject to the jurisdiction of the U.S. Federal Energy Regulatory Commission. Consequently, construction of the facilities would not affect the rates of any consumer of electric service regulated by the Commission. The Staff further found that there was considerable local opposition to the construction of the facilities on environmental grounds. Since Loudoun Power has applied for approval of the facilities pursuant to §§ 56-265.2 B and 56-580 D of the Code of Virginia, which require the Commission to consider environmental factors and local land use as required by § 56-46.1 of the Code of Virginia, the Staff recommended that activities at the proposed site should be limited to surveying, sampling soil and water, and collecting data required for environmental permits.

On July 2, 2001, the Kincaid Forest Homeowners Association, Inc. (the "Homeowners Association") and Kincaid VA, LLC (the "Developer") filed their Objection to Interim Waiver of the Requirements of § 56-234.3 of the Code of Virginia. The Homeowners Association and the Developer state that Loudoun Power has represented that the site of the proposed facility is currently zoned for power generation. However, the Homeowners Association and the

Developer believe that the Loudoun County Board of Supervisors' (the "County Board") approval of a Special Exception and Commission Permit (the "Special Use Permit") in 1991, in an application of a prior owner of the property for a different use upon the site of the proposed facility, has lapsed and cannot be enforced in light of the changes in land use and population distribution in the vicinity of the proposed facility since 1991. Furthermore, between 1991 and the date of Loudoun Power's application there has been no attempt to construct facilities upon the proposed site in accordance with the Special Use Permit and the circumstances surrounding the County Board's approval of the permit have changed.

The Homeowners Association and the Developer further argue that, pursuant to § 15.2-2307 of the Code of Virginia, Loudoun Power has no vested right to use the site proposed for the facilities because Loudoun Power has failed to rely in good faith upon the 1991 action of the County Board and has not incurred obligations or substantial expenses in pursuit of the specific project approved by the County Board.

The Homeowners Association and the Developer request that, in granting any exemption pursuant to § 56-234.3 of the Code of Virginia, the Commission expressly indicate that any such exempted expenditures should not be considered expenditures in reliance upon the 1991 action of the County Board, nor should such expenditures be considered to be made in pursuit of the specific project approved by the County Board.

On July 10, 2001, Loudoun Power filed its Response to Comments on Request for Interim Waiver. In response to the Staff's comments, Loudoun Power states that it has submitted comprehensive, detailed testimony demonstrating how it has systematically identified and responded to federal, state and local permitting issues associated with the proposed facilities and how the facilities have been modified significantly to address local concerns by limiting the impact the project may have on the citizens in the county and the environment. Loudoun Power states the limitations at the proposed site recommended by the Staff are consistent with its plans and with its overall outreach effort in the community, and Loudoun Power does not object to them.

Loudoun Power strongly disagrees with the Homeowners Association and the Developer's claims that the 1991 Special Use Permit authorizing the construction of power generating facilities on the proposed site has "lapsed and cannot be enforced." In support of its position, Loudoun Power cites a letter dated October 18, 2000, in which the Zoning Administration, Department of Building and Development of Loudoun County confirmed that the Special Use Permit remains valid and that none of its conditions placed a limitation on the length of time the permit would remain in effect. In addition, Loudoun Power cites a February 27, 2001, letter from the Chief of Community Planning of Loudoun County's Department of Planning confirming that the Special Use Permit is still valid. Loudoun Power argues, by conditioning any approval of an interim waiver on the fact that such approval does not rely on the Special Use Permit, the Homeowners Association and the Developer are seeking to enlist the aid of the Commission in support of a legal argument they may wish to assert in other forums. Loudoun Power argues the Commission should decline to inject itself into zoning matters that may arise in another forum. Loudoun Power further argues the granting of an interim waiver relates solely to the proceedings currently before the Commission. To the extent such

expenditures or commitments are made under the interim waiver, the Homeowners Association and the Developer will be free, without help or hindrance from the Commission, to address in other forums the significance of such expenditures or commitments under applicable zoning laws.

On July 27, 2001, the County Board filed a Motion to Stay Proceedings or in the Alternative to Extend the Procedural Schedule. In support of its motion, the County Board argues that there are important issues of zoning compliance related to the proposed facilities. On June 5, 2001, the Loudoun County Zoning Administrator issued a determination that the proposed facilities do not comply with the zoning approvals for the site. Specifically, the proposed facilities are larger than that allowed in the Special Use Permit, and they do not conform to the condition for approval of utilities by the Town of Leesburg.

Loudoun Power has appealed the Zoning Administrator's determination to the Loudoun County Board of Zoning Appeals (the "BZA") in accordance with § 15.2-2311 of the Code of Virginia. The BZA has scheduled a hearing on the matter for September 27, 2001. Section 15.2-2312 of the Code of Virginia requires the BZA to decide the matter within 90 days of the filing of the appeal.¹ After the BZA issues its decision, an aggrieved party has 30 days to file a petition with the Circuit Court for Loudoun County requesting the issuance of a writ of certiorari. After the Circuit Court issues its decision, the matter may be appealed to the Supreme Court of Virginia, which has discretion whether to accept such an appeal.

The County Board argues, given the Zoning Administrator's determination, Loudoun Power cannot file a complete application for a permit for a stationary air pollution source under § 10.1-1300 *et seq.* of the Code of Virginia. As part of Loudoun County's filing, the County Board must certify, pursuant to § 10.1-1321.1 of the Code of Virginia, that the location and operation of the source complies with its zoning regulations. The County Board further argues such certification cannot be made. The County Board argues the outstanding zoning issues bar the construction of the facilities as proposed. Consequently, the Commission should defer any action on the Application until there is a final resolution on the zoning issues. In the alternative, the County Board requests that the procedural schedule be extended or suspended to allow additional time for the filing of testimony and exhibits until after the resolution of the zoning appeal. The Town of Leesburg, the Homeowners Association and the Developer joined in the County Board's request. The Staff took no position on the County Board's request.

On August 8, 2001, Loudoun Power filed its Response Opposing Motion to Stay. In its Response, Loudoun Power argues the Commission should not be deceived that granting the County Board's Motion to Stay would maintain the status quo. If the Commission grants the Motion to Stay, it would have decided either of two issues against Loudoun Power, without having considered its Application on the merits: either it will have prejudged the ultimate outcome of the zoning appeal process against Loudoun Power, or it will have decided to imperil the project by subjecting Loudoun Power to significant additional risk due to the additional development delay associated with completing this proceeding if Loudoun County is successful in the zoning appeal process.

¹ Loudoun Power filed its appeal with the BZA on July 3, 2001. Accordingly, the BZA must render its decision by October 1, 2001.

Loudoun Power further argues the Zoning Administrator's determination is erroneous because the proposed peaker facilities are in substantial conformance with the Special Use Permit. Loudoun Power argues the Zoning Administrator failed to take into consideration the actual site plan for the project, which shows the company's compliance with applicable land use requirements, before issuing her decision. The site plan was filed with Loudoun County on June 20, 2001, but the Zoning Administrator has declined to process it.

Loudoun Power further argues it has not violated Conditions 2 and 5 of the Special Use Permit.² The Zoning Administrator has taken the position that Loudoun Power's proposed 535 MW peaker power plant does not conform to the 300 MW facility mentioned in the Special Use Permit. Loudoun Power argues that improvements in gas turbine technology since 1991, when the Special Use Permit was approved, will enable it to increase the output of the plant without upsizing the physical dimensions of the plant. Loudoun Power argues the focus should be on the use of the land not the output of the plant. The Zoning Administrator also stated that water and sewer service to the proposed site would have to be approved by the Town of Leesburg. Loudoun Power argues the proposed facility can be operated remotely, so no habitable structures will be located on the plant site, thus eliminating the need for sewer service. The only water that will be needed at the site will be non-potable water for injection into the turbines to control NOX emissions when the turbines are operated on fuel oil. Loudoun Power argues the plant's requirements for non-potable water can be met by an existing well on the site and from withdrawals from proposed on-site water storage tanks. Consequently, there are no approvals required from the Town of Leesburg.³

Finally, Loudoun Power argues it is the only party that would be prejudiced by a stay or delay in the proceeding, any delay may imperil the project, other project developers may shy away from developing projects in Virginia because of the increased business risk, and the Legislature's goal of competition within the electric industry in Virginia may be frustrated if the project fails to move forward.

Since the Homeowners Association and the Developer's objections to the grant of a waiver pursuant to § 56-234.3 of the Code of Virginia and the County Board's Motion for a Stay or in the Alternative to Extend the Procedural Schedule relate to local zoning matters, I will consider both matters in this Ruling.

The first matter that should be addressed is the 1991 Special Use Permit issued by the County Board. That permit is valid unless and until the Circuit Court of Loudoun County or some other court of competent jurisdiction finds that it is invalid. The Commission has no

² Condition 2 provides that development of the authorized use "shall be in substantial conformance with the description contained in the applicant's Statement of Justification." Condition 5 provides that "[w]ater and sanitary sewer service to the site shall be in accordance with any and all requirements of the Town of Leesburg" and further that "[f]inal site plan approval shall be withheld until Loudoun County has received official approval of the service arrangements by the Town of Leesburg and written acceptance of those arrangements by the applicant."

³ The Town Council for the Town of Leesburg has adopted a resolution that it will refuse to extend water and sewer service to the proposed site. Loudoun Power takes the position that the Town of Leesburg's denial of service effectively eliminates the requirement in the Special Use Permit that the Town "approve" the service arrangements for water and sewer.

jurisdiction to determine the validity of the permit. Consequently, the Commission cannot condition the grant of any waiver requested, pursuant to § 56-234.3 of the Code of Virginia, as urged by the Homeowners Association and the Developer, that the monies spent by Loudoun Power would not be in reliance on the Special Use Permit. Further, Loudoun Power has no objection to the limitations suggested by Staff, and the request is consistent with waivers granted by the Commission in other cases. Accordingly, I find that Loudoun Power's request for a waiver, pursuant to § 56-234.3 of the Code of Virginia, should be granted to allow the company to expend monies at its own financial risk to conduct initial site surveying, sampling of soil and water, and collecting data required to complete the permitting process for the proposed facilities. These limited development activities will permit Loudoun Power to proceed with its project without irreparably damaging the site prior to the Commission's final determination on the merits of the company's Application.

The County Board's Motion for a Stay is founded on the premise that the BZA's decision, which must be made on or before October 1, 2001, will forever resolve the two issues raised by the Zoning Administrator to the Special Use Permit. I am not quite as confident. Given the entrenched positions of the County Board and Loudoun Power, I envision the BZA's decision as the beginning of a long appeal process, which may ultimately be decided by the Supreme Court of Virginia. In which case, if I stay the proceedings until the zoning issues are resolved, Loudoun Power will be extremely prejudiced, the financial viability of the project may be in question, and the County Board may cause the project to fail due to delay rather than by a full review on the merits. For these reasons, I find that the County Board's Motion for a Stay or in the Alternative to Extend the Procedural Schedule should be denied. I will, however, entertain a motion at the evidentiary hearing to leave the record open for 30 days after date of the hearing in order to receive a copy of the BZA's decision and any appeal taken to the Circuit Court of Loudoun County. Accordingly,

IT IS DIRECTED THAT:

(1) Loudoun Power's request for a waiver pursuant to § 56-234.3 of the Code of Virginia, as limited herein, is hereby GRANTED; and

(2) The County Board's Motion for a Stay or in the Alternative to Extend the Procedural Schedule is hereby DENIED.

Michael D. Thomas
Hearing Examiner